No. 88-1461

In The

Supreme Court of the United States

October Term, 1988

RICHARD P. CHRISTY, ET AL.,

Petitioners,

v.

MANUEL LUJAN, JR., ET AL.,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF AMICUS CURIAE OF MOUNTAIN STATES LEGAL FOUNDATION IN SUPPORT OF PETITIONERS

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Mountain States Legal Foundation (MSLF or the Foundation) respectfully submits this brief amicus curiae in support of Richard P. Christy, et al., the Petitioners for certiorari. Copies of letters of consent to this filing have been filed with the Court.

INTERESTS OF AMICUS CURIAE

MSLF is a nonprofit, membership, public interest law foundation dedicated to bringing before the courts those issues vital to the defense and preservation of individual liberties, private property rights, and the free enterprise system. The Foundation is particularly active in Western public land and natural resource issues.

Foundation members include businesses and individuals in the Western states who live and work in the areas affected by recovery programs for large predators under the Endangered Species Act, 16 U.S.C. §§ 1531-43 (1982). MSLF members directly affected by the ruling below include livestock operators. Additionally, numerous other members who make their livings in the mining, timber, farming, and oil and gas businesses, and those who service these businesses are indirectly affected.

Elimination of long established property rights in order to facilitate predator recovery is an important issue to many rural Westerners. In 1987, the United States Forest Service and Fish and Wildlife Service denied MSLF members in the town of Yellow Pine, Idaho, the only winter road access to their town and homes because of possible disturbance to endangered wolves. The elevation of endangered species over established property rights is a real threat to both homes and livelihoods of rural Westerners.

In this case, the Foundation asks the Court to exercise its jurisdiction in order to define the rights of those whose homes and livelihoods are affected by the ruling below.

STATEMENT OF THE CASE

Amicus curiae adopts Petitioners' statement of the case.

REASONS FOR GRANTING THE WRIT

I. THE FEDERAL GOVERNMENT IS RESPONSIBLE FOR REINTRODUCTIONS OF LARGE PREDATORS AND THE COURT SHOULD DECIDE THE LEGAL RIGHTS AND RESPONSIBILITIES ACCORDINGLY

Since passage of the Endangered Species Act in 1973, the federal government has put a major effort into encouraging the recovery of grizzly bears and wolves. *See* U.S. Fish and Wildlife Service, Grizzly Bear Recovery Plan (January 29, 1982); U.S. Fish and Wildlife Service, Northern Rocky Mountain Wolf Recovery Plan (August 2, 1987). Initial attempts at reintroduction have begun and they affect this case. *See* Petition at 8-9. As those efforts have started to succeed, the federally nurtured predators have increasingly come into conflict with livestock on public and private lands.

As the level of contention has built, Westerners have begun to speak out. In Idaho, the State legislature passed a memorial aimed at blunting adverse impact on the lives of rural Idahoans. Western farming and ranching organizations have spoken out forcefully to try to stop the introduction of predators. *See, e.g.*, American Farm Bureau Federation Petition for Regulatory Changes (January 5, 1989).

The conflict is between federal government policy and property rights in the Western states where the large predators are being reintroduced. This is the kind of dispute between the weak and strong that the judicial branch of our constitutional government was designed to protect. Instead of addressing the conflict between protected predators and Western property owners, the courts have ignored the federal efforts and denied the responsibility of the federal government. The result is a ruling like that in *Christy*. It is time for the Court to abandon the legal fiction and address the property rights conflict.

The lower courts have misassimilated laws denying government responsibility for predators and modern laws prohibiting killing of protected animals. They have, in essence, overruled long established law allowing defense of property against predators. Protected predators will be given free reign if the *Christy* ruling is not reviewed and reversed.

Even the endangered species recovery plans prepared by the United States Fish and Wildlife Service recognize that conflict caused by reintroduction programs is to be avoided. Public acceptance is essential. *See* Northern Rocky Mountain Wolf Recovery Plan at 23. If conflict between the endangered species and rural residents is allowed to fester, then recovery can be jeopardized.

II. THE PUBLIC, NOT SELECT INDIVIDUALS, SHOULD PAY FOR ESTHETIC PUBLIC ENVIRONMENTAL BENEFITS

This case also involves a larger issue of who should pay for esthetic benefits to our nation's environment. The

cost of the cities' health and esthetic environmental benefits, such as clean air, clean water, and toxic clean-up is borne by the nation as a whole either through increased consumer goods costs or taxation. On the other hand, the cost of greenbelts, pristine countryside and streams, and reintroductions of wildlife are typically paid for by rural property owners.

At least theoretically, the laws and Constitution should protect the minority from majority imposition of such a burden. But this has not proven to be true where private property interests conflict with esthetic environmental regulation. Environmental regulation has gone from uncompensated takings to protect the health, safety or morals of a community, *see Mugler v. Kansas*, 123 U.S. 623, 668-69 (1927), to providing convenient public beach access. *See Nollan v. California Coastal Comm'n*, 483 U.S. 825 (1987) (reversing taking).

The *Christy* case represents the culmination of this trend. Mr. Christy is being punished as a consequence of protecting his personal property within the confines of his real property. Like the landowner in *Nollan*, Mr. Christy is being asked to pay for esthetic benefits to the public by giving up one of the sticks in his bundle of property rights.

The Court should take jurisdiction in this case to rectify this fundamental injustice and misdirection of the law by the lower courts.

III. THE NINTH CIRCUIT'S DECISION COMPLETES ELIMINATION OF A LONG ESTABLISHED PROPERTY RIGHT

Fifty years ago, the right to defend one's property from protected wildlife was a settled principle of law. In 1943, Corpus Juris Secundum stated that "[l]egal justification may always be interposed as a defense by a person charged with killing a wild animal contrary to law. Hence the killing of game protected by the statute or regulations is not prevented by them when reasonably necessary for the protection of person or property . . . " 38 C.J.S. *Game* § 10 at 12 (1943). *See Christy v. Hodel*, 857 F.2d 1324, 1329 (9th Cir. 1988) (App. 16a) (citing cases and annotation). Now the Ninth Circuit says that there is no such right, nor does this situation involve any right of compensation for the taking of private property. *Christy*, 857 F.2d at 1329-30 (App. 18a).

The extreme position of recent circuit court opinions is expressed in the *Christy* opinion, 857 F.2d at 1329 (App. 17a). The court has approved the concept that Congress can pass a law denying a right to protect one's own life from protected predators. *See Mountain States Legal Foundation v. Hodel*, 799 F.2d 1423, 1428 n.8 (10th Cir. 1986) (cited with approval in *Christy*). An ancient right to protect property and person has apparently disappeared without leaving a trace.

CONCLUSION

In recent years the Court has searched for new rights in our Constitution. As it has done so, the judicial system has left behind some of the rights held dear by those who authored the Constitution. If the Constitution does not have a lasting place for life and property; then we must ask, for what does it have a lasting place?

For the above reasons the writ should be granted.

Respectfully submitted,

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Dated: March 31, 1989